transmission by will." [9] This statement, so far as it relates to transactions *inter vivos* was a *dictum*, conspicuously *obiter*, unsupported by the authorities cited,[10] and palpably erroneous in view of modern decisions.[11]

APPORTIONMENT OF AN ANNUITY BETWEEN CAPITAL AND INCOME. — In the settlement of estates the contingent and deferred nature of life [1] annuities has frequently made the application of well-established principles extremely difficult. Annuities may be granted during the life of the testator or he may bequeath them as legacies. In the latter case the problem resolves itself into an attempt to determine his exact intention. Did he intend the annuity to be charged on his realty,[2] or personalty,[3] on the income,[4] or the *corpus* [5] of his estate; or that the annuitant might demand security for the payment of the future instalments of the annuity,[6] or compel its commutation into a lump sum? [7] In England the custom of granting marriage portions in the form of life annuities frequently brings up the former case. As the annuity is charged in the lifetime of the testator, his death leaves it as a debt upon his estate.[8] When the residuary estate is divided between a tenant for life and a remainderman the method of its payment has so perplexed the courts that two distinct rules [9] have sprung up, both professing to be the exemplification of the same legal principles.

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[9] Parsons *v.* Lyman, 20 N. Y. 103, 112. Cited in Cross *v.* Trust Co., 131 N. Y. 339, and in *In re* Corning's Estate, 23 N. Y. Supp. 285. See also Edgerly *v.* Bush, 81 N. Y. 199.

[10] The authorities he cited bore only on the real point of that case, namely, that in cases of descent by will or otherwise, the law of the domicile usually prevails. But note that this is not necessarily so. In fact in Illinois, where this transaction occurred, personalty descends by the law of Illinois regardless of the domicile of the owner. Cooper *v.* Beers, 143 Ill. 25. Hence, even if this had been a transfer by descent instead of a transfer *inter vivos*, it would seem that Wisconsin could not have taxed the transfer because the law of Wisconsin did not assist in it. There is no case directly in point, but this is the inevitable conclusion of the reasoning in *In re* Estate of Swift, *supra*.

[11] Emery *v.* Clough, 63 N. H. 552; Cooper *v.* Beers, *supra;* McCollum *v.* Smith, Meigs (Tenn.) 342; Cammel *v.* Sewell, 5 H. & N. 728; Marvin Safe Co. *v.* Norton, 48 N. J. L. 410; Harvey *v.* Richards, 1 Mason (U. S.) 381. The inaccurate statement that the tax is a tax on the right to "receive" property makes it doubtful whether the court did not attach some weight to the fact that the donees were residents of Wisconsin. It is hard to see how such reasoning could be supported. See Matter of Green, 153 N. Y. 223.

[1] It seems interesting to note that the British "consols" are perpetual annuities. The theory is that the Government need never return the principal but must continue to pay the income forever. Statutes 27 Geo. II, c. 27. Obviously, they involve no contingency.

[2] *In re* Nathan's Estate, 4 Pa. Dist. R. 149; Ley *v.* Ley, L. R. 6 Eq. 174.

[3] Paget *v.* Hurst, 9 Jur. N. S. 906.

[4] Baker *v.* Baker, 6 H. L. Cas. 616; Nudd *v.* Powers, 136 Mass. 273; Irvin *v.* Wollpert, 128 Ill. 527; Delaney *v.* Van Aulen, 84 N. Y. 16.

[5] Howarth *v.* Rothwell, 30 Beav. 516; Pierrepont *v.* Edwards, 25 N. Y. 128; Byam *v.* Sutton, 19 Beav. 556; Phillips *v.* Gutteridge, 3 De G. J. & S. 332; Peason *v.* Hellliwell, L. R. 18 Eq. 411; *In re* Watkins Settlement, 55 Sol. J. 63, 73.

[6] Morgan *v.* Pope, 7 Coldw. (Tenn.) 541; *In re* Parry, 42 Ch. D. 570.

[7] Wakeham *v.* Merrick, 37 L. J. Ch. 45; Ford *v.* Batley, 17 Beav. 303; Stokes *v.* Cheek, 28 Beav. 620.

[8] *In re* Poyser, [1908] 1 Ch. 828.

[9] Rule I. — Calculate what sum if set aside at the testator's death would, with

The conception that every future or contingent interest has a real present value is, of course, the basis of business in general and banking and insurance in particular. Mortality tables present a method for discounting life interests with great accuracy.[10] And so the various rights here under consideration can be reduced to a common basis, as mixed fractions are to a common denominator. The present or actuarial value of the annuity [11] will be called *a*, that of the life tenant's interest *b*, and that of the remainderman's *c*. Their sum must equal the gross residue. The clear residue of the estate is found by subtracting sum *a* from the gross residue, and the life tenant is entitled to the income of this clear residue. Now if the will permits the executors to buy an annuity from an insurance company with sum *a*, no further difficulty is encountered.[12] But ordinarily this risk must be borne by the life tenant or remainderman or both. A recent English case, while adopting Rule I,[9] has said the method of apportionment lies in the discretion of the court. *In re Poyser*, [1910] 2 Ch. 444. While it is correct for the court to apportion the *risk* involved in the annuity in any way that it sees fit, provided the parties are compensated for assuming it, the court has no right to change the *burden* [13] of the annuity, for that would be varying the value of the legacies. Theoretically, then, the life tenant is entitled to the income of the clear residue, and if he is to assume part of the risk of the annuity he must be paid a proportionate part of *a*, but as it was not the testator's intention to give him a lump sum, this amount must be changed into an annuity dependent on his own life. Likewise the remainderman's compensation must be translated into an insurance accruing on the death of the life tenant, for until then he is not entitled to anything. These can both readily be done if the apportionment of the principal annuity has been in the ratio of *b* and *c*, for then the annuity and insurance of sum *a* would be reciprocal, both depending on the same contingency and respectively equivalent to the income and principle of *a*. This then is the analytical justification of Rule II.[14] Rule I unduly favors the life tenant.[15] But it is

simple interest to the day of payment have met the particular instalment of the annuity. Charge that sum to capital and the balance to income. Allhusen *v.* Whittell, L. R. 4 Eq. 295; *In re* Harrison, 43 Ch. D. 55; *In re* Perkins, [1907] 2 Ch. 596; *In re* Thompson, [1908] W. N. 195; *In re* Poyser, [1910] 2 Ch. 444.

Rule II. — Apportion each instalment of the annuity between income and capital in proportion to the actuarial values of the life tenant's and remainderman's interests. *In re* Muffett, 39 Ch. D. 534; Yates *v.* Yates, 28 Beav. 637; Arathoon *v.* Dawson, [1906] 2 Ch. 211.

[10] The Northampton and Carlisle tables are those most frequently used. See GIAUQUE AND MCCLURE'S PRESENT VALUE TABLES, based on the latter, in which the values of life interests, contingent and vested, have been carefully calculated.

[11] To be calculated as at the death of the testator.

[12] *In re* Bacon, 62 L. J. (Ch.) 445; *In re* Henry, [1907] 1 Ch. 30. Sum *a* is raised by mortgaging the principal.

[13] A covenant to pay an annuity involves both a burden and a risk. A covenant to pay a fixed sum involves a burden only, while a covenant to pay, in consideration of a certain sum, double that sum or nothing depending on a contingency equally probable to happen or not, theoretically involves nothing but a risk.

[14] See note 9, *supra*. The shares of the instalments of the annuity chargeable to principal cannot be paid directly but only by successive mortgages upon it, for otherwise a future interest would be enjoyed in the present. This has not been brought out distinctly by the cases that have adopted Rule II. The interest due on the mortgages must be met by subsequent mortgages.

[15] For example, if the gross residue of an estate were $100,000, the income $4000, the

submitted that the real difficulty occasioned by these cases is the uncertainty introduced into the administration of estates, and that a statute embodying either rule would undoubtedly be welcomed by conscientious trustees.

RESTRICTIONS UPON THE VENDOR OF GOOD WILL. — It is sometimes held that the vendor of the good will of a business is under no special obligations with regard to it after the sale, aside from those fixed by the law of unfair competition, and may at once re-enter business on even terms.[1] But good will consists not merely of the chance of trade arising from the existence of the business as a going concern, distinct from the individual who carries it on, but also of the opportunities arising from the reputation of the proprietor.[2] This latter element, nearly always present, is often of the greatest importance,[3] and most courts endeavor to include it in such a sale. Though it is obvious that the good feeling of one man toward another cannot be transferred, yet the competitive power of the vendor, which if exercised would include the essence of this good will,[4] can be restricted or destroyed. And in Massachusetts a voluntary vendor is precluded from setting up a competitive business if it is found that it will impair the good will sold.[5] This, unfortunately, is not general law, and in the absence of an express provision in the contract of sale, most courts allow the vendor to re-enter the same trade.[6] A less severe restriction would be to prevent the vendor from dealing with the customers of the old business. Though this disregards the fact that good will is valuable because of the attraction of new patrons by the reputation of the business as well as because of the custom of the old ones, in the cases where it has been urged it has been overthrown as too broad a restriction.[7] The commonest limitation restricts the vendor only from soliciting the customers of the old business.[8] This seems to go too far or not far enough.

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annuity $2000 a year and the life tenant was 23 years old, Rule II would correctly give him a uniform income of about $2564. For on a four per cent basis such a life tenant's interest would be to the remainderman's as 71.8 is to 28.2. Rule I would give him about $3923 the first year, and less and less each year thereafter, for it treats each instalment of the annuity as if it were a separate and unexpected debt, falling suddenly upon the estate. It is to be observed that under neither rule is the age of the annuitant material.

[1] Williams *v.* Farrand, 88 Mich. 473; Cottrell *v.* Babcock Printing Press Co., 54 Conn. 122; Bergamini *v.* Bastian, 35 La. Ann. 60. See ALLEN, GOODWILL, 32.

[2] See Morgan *v.* Schuyler, 79 N. Y. 490, 493; Slack *v.* Suddoth, 102 Tenn. 375, 378; ALLEN, GOODWILL, 5, 42.

[3] Even in a mercantile business all the good will may be attached to the person. Brett *v.* Ebel, 29 N. Y. App. Div. 256.

[4] See STORY, PARTNERSHIP, § 99; 20 HARV. L. REV. 172.

[5] Old Corner Book Store *v.* Upham, 194 Mass. 101; Foss *v.* Roby, 195 Mass. 292. *Cf.* Townsend *v.* Hurst, 37 Miss. 679.

[6] Ranft *v.* Reimers, 200 Ill. 386; Zanturjian *v.* Boornazian, 25 R. I. 151. See Washburn *v.* Dosch, 68 Wis. 436, 439; Jackson *v.* Byrnes, 103 Tenn. 698, 700.

[7] The principal case; Leggott *v.* Barrett, 15 Ch. Div. 306.

[8] Trego *v.* Hunt, [1896] A. C. 7; Althen *v.* Vreeland, 36 Atl. 479 (N. J.); Ranft *v.* Reimers, *supra*. See Zanturjian *v.* Boornazian, *supra*. The vendor will be enjoined from soliciting even the trade of those old customers who have already begun dealing with him again, Curl Bros. Ltd. *v.* Webster, [1904] 1 Ch. 685; and from soliciting the correspondents as well as the customers of the old firm, Mogford *v.* Courtenay, 45 L. T. R. N. S. 303. See 9 HARV. L. REV. 479.